Court of Appeal File No.: 59310
Court of Appeal File No.: 59311
Court of Appeal File No.: 59320

COURT OF APPEAL FOR ONTARIO

BETWEEN

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODISTCHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE

DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE 2 SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUSMARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON – THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES – GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE –ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER – THE ROMAN

CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIEFORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants

Proceedings under the *Class Proceedings Act*, 1992, S.O. 1992. C.6

UPDATED FACTUM OF RESPONDENT, THE NATIONAL CENTRE FOR TRUTH AND RECONCILIATION, WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES

~~July 16, 2015~~ October 16, 2015

Joanna Birenbaum (LSUC 40352G)
Barrister and Solicitor
555 Richmond Street West
Suite 1200
Toronto, Ontario
M5V 3B1

Phone: (647) 500-3005
Fax: (416) 968-0325

Solicitor for National Centre for Truth and Reconciliation

Counsel to the Respondent, Chief Adjudicator Counsel for the Respondent, IAP Joseph Arvay, Q.C. Farris, Vaughn, Wills & Murphy LLP 2500-700 W Georgia St. Vancouver, BC V7Y 1B3 Tel: (604) 661-9338/Fax: (604) 661-9349	**Counsel for the Respondent, the 22 Catholic Charities** Michel Thibault, David Stack, Janine Harding, W.R. Donlevy, Q.C. McKercher LLP 374 Third Avenue south Saskatoon, SK S7K 1M5 Tel: (306) 664-1331/Fax: (306) 653-2669
Counsel for the Respondent, The Government of Canada Gary Penner, Diane Fernandes Attorney General of Canada Department of Justice Ontario Regional Office The Exchange Tower 130 King Street West Suite #3400, Box Toronto, ON M5X 1K6	**Counsel for the Respondent** Dan Carroll Field Law 2000-10235 10-1 ST NW Edmonton, AB T5J 3G1 Tel: (780) 423-7614/Fax: (780) 428-9329
Counsel for the Respondent, The Sisters of St. Joseph of Sault Ste. Marie Charles Gibson, Ian Houle, Albertos Polizogopoulos Vincent Dagenais Gibson LLP 60 rue Dalhousie Street, Suite 400 Ottawa, ON K1N 7E4 Tel: (613) 241-2701/Fax: (613) 241-2599	**Counsel for the Respondent, Independent Counsel** Peter Grant Peter Grant & Associates 900-777 Hornby Street Vancouver, BC V6Z 1S4 Tel: (604) 685-1229/Fax: (604) 685-0244
Counsel for the Respondent, the Nine Catholic Entities Pierre Baribeau Lavery, de Billy 1 Place Ville Marie, Suite 4000 Montreal, QC H3B 4M4 Tel: (514) 877-2965/Fax: (514) 871-8977	**Counsel for the Respondent, Independent Counsel** Diane Soroka Diane Soroka Avocate Inc. 447 Strathcona Avenue Westmount, QC H3Y 2X2 Tel: Tel: (514) 939-8384/Fax: (514) 939-4014
Counsel for the Assembly of First Nations Stuart Wutke 55 Metcalfe Street, Suite 1600 Ottawa, ON K1P 6L5 Tel: (613) 241-6789/Fax: (613) 241-5808	**Counsel for Privacy Commissioner of Canada, Intervener** Kate Wilson/~~James Nowlan~~ Regan Morris Office of the privacy Commissioner of Canada, Legal Services 30 Victoria Street, 1st Floor Gatineau, QC K1A 1H3 Tel: (810) 994-5878/Fax: (819) 994-5863

Counsel for the Truth and Reconciliation Commission Falconers LLP Barristers-at-Law Julian N. Falconer/Julian K. Roy/Junaid K. Subhan 10 Alcorn Avenue, Suite 204 Toronto, ON M4V 3A9	

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UPDATED FACTUM OF RESPONDENT, THE NATIONAL CENTRE FOR TRUTH AND RECONCILIATION, WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES

The importance of the National Research Centre that is being established here today…is that it will be a constant reminder to all Canadians… It will be a reminder to all future Canadians that indeed what we have heard from Survivors in the past ten years or so did happen. We are creating a national memory here…Because we know, if we do not do that, then it will be just a matter of two or three generations from now that most Canadians will not only be able to forget that this occurred, but they will be able to deny that it occurred. And that can never happen, that must never happen, because this is part of what Canada is all about.

Honourable Justice Murray Sinclair
Remarks at the National Centre for Truth and Reconciliation Signing Ceremony
June 21, 2013

A. OVERVIEW OF POSITION

1. The National Centre for Truth and Reconciliation ("NCTR")[1] will address the following points on appeal:

   a. The Indian Residential School Settlement Agreement (the "Agreement") does not permit destruction of Claimant IAP applications, hearing transcripts, audio recordings, and adjudicated decisions, without the express consent of Survivors;

   b. Survivors have the right to preserve un-redacted copies of their IAP applications, transcripts and audio recordings, and redacted copies of decisions, in the NCTR. This right is not contingent on the consent or agreement of any other party or individual. Preservation of un-redacted records by the NCTR does not mean these records will be publicly available in un-redacted form. Privacy interests or rights of persons named in the records will be strictly protected;

[1] The NCTR was established pursuant to Schedule "N" to the Indian Residential School Settlement Agreement, which mandated the Truth and Reconciliation Commission to establish a "National Research Centre" to ensure the preservation of the Commission's archives. The Trust and Administrative Agreements establishing the NCTR refer to the NCTR as the "Centre for Truth and Reconciliation," which name has now been confirmed as the NCTR.

c. The Agreement entitles Survivors to be informed of their right to archive their IAP records in the NCTR. To date, Survivors have not been informed of this right in fulfillment of Paragraph O(ii) to Schedule "D" of the Agreement;

d. The court below properly exercised its supervisory jurisdiction by ordering an Enhanced Notice Plan to implement the above term in the Agreement. The Notice Plan does nothing more than give effect to the express legal obligation in the Agreement to inform Survivors of their right to archive IAP transcripts in the NCTR.

e. The Court below, however, erred in prematurely deciding certain issues related to the Notice and Consent program in the absence of evidence and submissions from the parties.

2. The Indian Residential School ("IRS") system, as acknowledged by the Prime Minister of Canada, is a tragic and "sad chapter in Canadian history"[2] with profoundly damaging and lasting effects for Aboriginal peoples: a system recently described by the Chief Justice of the Supreme Court of Canada as a form of cultural genocide.[3]

3. The Indian Residential School Settlement Agreement was negotiated by the Parties with the full knowledge of the devastating individual and systemic impacts of the IRS system and legacy on Aboriginal peoples, and the significance, for all of Canada, of reconciliation.

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[2] June 11, 2008, Statement of Apology to Former Students of Indian Residential Schools, downloaded at: http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649

[3] Speech by Chief Justice Beverely McLachlin, *Reconciling University and Diversity in the Modern Era: Tolerance and Intolerance*, delivered at the Aga Kahn Museum, Toronto, (May 28, 2015), downloaded at: http://www.theglobeandmail.com/news/national/unity-diversity-and-cultural-genocide-chief-justice-mclachlins-complete-text/article24698710/

4. As recognized by the Yukon Territory Supreme Court in its decision approving the Agreement:

> The Royal Commission on Aboriginal Peoples concluded that the Residential School system was a blatant attempt to re-socialize aboriginal children with the values of European culture and obliterate aboriginal languages, traditions and beliefs. The inferior education, mistreatment, neglect and abuse are a concern to all Canadians...
>
> The settlement provides compensation for individual survivors as well as healing programs and benefits for their families and communities. It is a compensation package that is beyond the jurisdiction of any court to create. **It is much more than the settlement of a tort-based class action. It is a Political Agreement.**[4] (emphasis added)

5. The intentions of the parties to the Agreement was to achieve a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" and to promote "healing, education, truth and reconciliation, and commemoration."[5]

6. It was also the intention of the parties to the Agreement to finally give voice to Survivors and to treat Survivors with dignity and respect, including through individual compensation for the harms suffered.

7. The above principles and statements of intention guide the Court's interpretation of the Agreement in this Appeal.

8. In the context of an Agreement intended to recognize and redress policies and harms amounting to cultural genocide, the destruction of the aggregate record of some of the most serious abuses perpetrated by the IRS system, cannot be read in the Agreement without the clearest and most express language evidencing this intention. There is no such express language in the Agreement.

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[4] *Fontaine v. Canada (Attorney General)*, 2006 YKSC 63 at paras. 7-8, Joint Brief of Authorities, Tab 34.
[5] Preamble to the Agreement, paras. B and C, Joint Compendium of Documents, Tab 23, p.241.

9. Preservation and publication are not synonymous. IAP records can be preserved, as contemplated by the Agreement, at the same time as obligations of confidentiality to individual Survivors, perpetrators and others, respected.

10. For individual Survivors who choose to tell their stories, whether privately or publicly, the Agreement does not circumscribe their right to speak and share. Survivors' rights to share their experiences (whether orally or through records) is subject only to their obligation to keep confidential information (such as alleged perpetrator witness statements) disclosed at the IAP hearing.[6]

11. By making an IAP Claim for a sum of money which, in any event, could never fully compensate Survivors for the harms experienced, IAP Claimants did not give up their rights to tell and preserve their narratives of abuse. The position of the Catholic Entities on Appeal amounts to a gag on Survivors. According to the Catholic Entities, Survivors cannot choose to obtain copies of their IAP Records and preserve them, without the permission of numerous others. The clear terms of the Agreement do not exact this price of silence from Survivors in exchange for monetary compensation under the IAP.

B. THE FACTS

Survivors' Rights to Archive their IAP Records

12. The steps involved in an IAP Claim are clearly set out in the Agreement, as are the categories of records submitted by the Claimant and responding parties. These facts are not in dispute and will not be set out in detail here.

[6] Schedule "D", Paragraph O(i), Joint Compendium of Documents, Tab 24, p.346.

13. From the perspective of Survivor rights and control over their own information, it is important to recognize that a significant amount of the documentation produced and disclosed in the IAP process is documentation obtained and submitted by the Survivor. Once an application has been made, the Survivor must then submit various "mandatory" documents to the IAP to support the claim, such as income tax, education, corrections, workers compensation, employment, medical and other records.[7] The Agreement imposes strict confidentiality obligations on government and Church respondents who receive copies of Applications and the extensive and personal mandatory records.

14. In response to each application, the government of Canada must undertake historical research of records held by the government of Canada. The documents which Canada is required to produce are:

- Documents confirming the Claimant's attendance at the school(s) ["Claimant Reports"];
- Documents about the person(s) named as abusers, including those persons' jobs at the residential school, the dates they worked or were there, and any sexual or physical abuse allegations concerning them ["POI Reports"];
- The report about the residential school(s) in question and the background documents; [the "School Narratives"] and
- Any documents mentioning sexual abuse at the residential school(s) in question.[8]

[7] Schedule "D", Appendix VII, Joint Compendium of Documents, Tab 24, pp.359-360
[8] Schedule "D", Appendix VIII (at p.30), Joint Compendium of Documents, Tab 24, p.361

15. In preparing the above information in response to each claim, the Government of Canada reviews and relies on historical documents and records, which, pursuant to Canada's production obligations under Schedule "N", have now been produced to the Commission and will be archived by the NCTR. Appendix VIII to Schedule "D" of the Agreement which requires Canada to produce the above records, recognized that while some of the historical information to support a Survivor's claim may be on the public record, these records were created by and in the hands of the government, and were not easily accessible to often isolated Survivors.

16. There are three categories of records which are the focus of the NCTR's submissions on the right of Survivors to preserve their records in the NCTR in accordance with Schedule "D" to the Agreement:

> (1) redacted copies of adjudicated decisions, to which the Claimant is entitled pursuant to Schedule "D" O(i);
>
> (2) (unredacted) copies of Applications, which are the Claimants' own record/evidence and to which the Claimant is entitled as of right as the creator of the record; and
>
> (3) (unredacted) copies of transcripts of the Survivor's own evidence at the IAP hearing to which the Claimant is entitled pursuant to Schedule "D" O(ii), as set out below.

The other records which form part of the IAP process to which a Claimant may be entitled as the individual to whom the information/record relates (e.g. mandatory

records listed above) are not the subject of this Appeal (and in any event are accessible to the Survivor from the original records-holders).

17. Schedule D(O)(ii) to the Agreement clearly provides that Survivors have the right to: (a) obtain a copy of their (un-redacted) transcript of their own evidence for memorialization; and (b) be made aware of their right to archive their IAP transcript:

> Proceedings will be recorded and will be transcribed for these purposes, as well as if a Claimant requests a copy of their own evidence for memorialization. **Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose.** (emphasis added)

18. For various reasons, to date Survivors have not been informed of their right to archive or preserve their records in fulfillment of the above provision of the Agreement.

19. The evidence in the Court below was that, despite discussions between the Truth and Reconciliation Commission (the "Commission") and the IAP Secretariat, no program was ever implemented to inform Claimants of their right to have a transcript of their evidence deposited in an archive developed for the purpose.

20. John Trueman's Affidavit sworn April 8, 2014 on behalf of the Chief Adjudicator, outlines in detail the discussions between the IAP Oversight Committee and the Commission with respect to a consent program for archiving IAP Claimants' transcripts and other documents. By letter dated January 11, 2011, from Dean Mayo Moran, Chair of the IAP Oversight Committee, to the Honourable Justice Murray Sinclair, Dean Moran responds to questions asked by the Commission, specifically:

(1) Are Survivors given the option of having their transcript deposited in an archive? If so, how are they given that option?

(2) Will the IAP jointly draft a consent option to be given to IAP participants that would give them the option to deposit their transcripts with the TRC?

Dean Moran's response to these questions indicated the IAP's intention to inform Survivors of their rights and to obtain consents in the future: "We hope to implement this option in partnership with the TRC."[9] Unfortunately, no such consent program was ever implemented, nor was there a process for Claimants to exercise their right to consent to deposit their records in an archive developed for the purpose.[10]

21. The Government of Canada, who is present at every IAP Claim hearing, proposed in its factum and oral submissions in the Court below that it would implement a Notice Plan whereby former IAP applicants would be contacted and asked for permission to archive their personal information in their IAP applications, transcripts and decisions. The Notice Plan was proposed by Canada because, to date, Claimants had not been informed of this right.

22. The purpose in setting out the above facts is not to point fingers at any particular party for failing to inform Claimants of their rights pursuant to Schedule "D" (O)(ii). Rather it is to lay the foundation for the submissions below that this obligation to Claimants is yet to be fulfilled, and must be fulfilled, in compliance with the terms of the Agreement.

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[9] Affidavit of John Trueman, sworn April 8, 2014 ("Trueman Affidavt") at paras. 86-126 and Exhibit "U", Joint Compendium of Documents, Tab 34, pp.929-944, 1135-1139.

[10] Trueman Affidavit, para.126, Joint Compendium of Documents, Tab 34, p.944; see also Affidavit of Daniel Ish, sworn September 17, 2013, at para. 60, Joint Compendium of Documents, Tab 32, p.500; and Affidavit of David Russell, sworn May 4, 2014 ("Russell Affidavit") at para.46, Joint Compendium of Documents, Tab 47, p.1754.

Aggregate IAP Evidence Historically Important, Unique and Irreplaceable

23. The evidence given by Survivors in the IAP process includes evidence of the deepest and most painful trauma, including sexual, physical and psychological abuse by religious authorities and others. For many Survivors, the IAP hearing is the one and only time in their lives they will give voice to the details of these intensely personal traumatic experiences.

24. As stated by Justice Sinclair in his letter to the IAP Oversight Committee in October 2010 (in support of a consent program for transfer of IAP records to the Commission):

> The preservation of IAP records is fundamental to maintaining a full and complete record of Residential Schools. Future generations will never know what went on in the schools if the records are lost. It will be easy to dismiss second and third hand accounts of that history without the first-hand accounts to add their weight of truth.
>
> ...[t]he IAP has the single largest collection of statements given by Survivors that currently exists...We consider it impractical and contrary to the goal of treating Survivors in a respectful way that protects their health and safety to ask Survivors who have made IAP Claims to repeat their statements to us. Indeed many have declined to do so because of the trauma that doing so causes them each time.[11]

25. Prior to the decision of the court below, Library and Archives Canada ("LAC") had determined that certain IAP Records held by Aboriginal Affairs and Northern Development Canada and by the Indian Residential Schools Secretariat have enduring historical value, including IAP decisions.[12] Further, in February 2014, LAC advised representatives of the IAP Secretariat that it had determined that audio recordings and

[11] Trueman Affidavit, Exhibit T, Joint Compendium of Documents, Tab 34, p.1131-1134

[12] *Records Disposition Authority 2011/010*; Trueman Affidavit para. 81 and Exhibits J1 and J2, Joint Compendium of Documents, Tab 34, pp.928-929; 1012-1024.

hearings transcripts were of enduring historical value and that LAC intended to re-open its appraisal of the IAP Secretariat's records.[13]

The National Centre for Truth and Reconciliation

26. Schedule "N" to the IRSSA, under which the Commission and the NCTR were established, recognizes that "reconciliation is an ongoing individual and collective process."[14] It is also a long-term process. For this reason, the Agreement established the NCTR as the permanent and enduring 'national memory' of the Indian Residential School system and legacy.

27. The NCTR is thus entrusted under the Agreement with the significant responsibility of archiving the IRS records and ensuring that this history is never denied or forgotten. "In keeping with the objectives and spirit of the Commission's work"[15], the NCTR's core functions include education and outreach to redress and overcome the IRS legacy. Preserving and deepening our understanding of the IRS history and its impacts are integral to the process of reconciliation.

28. Formally established over two years ago, on national Aboriginal day, June 21, 2013, the NCTR is an Indigenous Archive.[16]

29. Housed within the University of Manitoba and partnered with Indigenous and non-Indigenous entities across the country, the NCTR is committed to the ongoing and long-term project of reconciliation.[17]

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[13] Trueman Affidavit, paras. 84-85, Joint Compendium of Documents, Tab 34, p.929.
[14] Schedule "N", *Principles*, Joint Compendium of Documents, Tab 25, p.381
[15] Schedule "N", para. 12, Joint Compendium of Documents, Tab 25, p.391; Trust Deed, preamble paragraph H attached as Exhibit A to the Affidavit of Gregory Juliano, sworn April 11, 2014 ("Juliano Affidavit"), Joint Compendium of Documents, Tab 35, p.1320.
[16] Juliano Affidavit, para. 8, Joint Compendium of Documents, Tab 35, p.1291.

30. The NCTR is dedicated to 'reconciliation archiving' in its mandate and activities, governance structure, and physical and digital design. To this end, the NCTR is committed to engaging in education and outreach on reconciliation, supporting Aboriginal researchers and archivists, supporting Survivors and ensuring their voices are heard and shared, and employing staff who are expert in the IRS history.[18]

31. The NCTR's governance structure includes a Governing Circle, the majority of whose members are Aboriginal, and a Survivors Circle, comprised of survivors of the residential school system, their families or their ancestors. Both entities provide advice to the NCTR, the University and its partners.[19]

32. The NRC is further governed in accordance with national and international research and archiving principles, protocols, guidelines and best practices for Indigenous and human rights research and archiving, including Aboriginal principles of Ownership, Control, Access and Possession ("OCAP"), Protocols for Native American Archival Materials, and the *Tri-Council Policy Statement: Ethical Conduct of Research Involving Humans* (particularly the chapter on First Nations, Inuit and Métis peoples of Canada).[20]

33. The Agreement, as well as the Trust Deed and Administrative Agreement establishing the NCTR, anticipate the NCTR archiving IAP Records as well as other highly sensitive and confidential records.

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[17] Juliano Affidavit, paras. 7-16 and Exhibits A and B., Joint Compendium of Documents, Tab 35, pp.1291-1293, 1318-1325 (Exhibit "A", Trust Deed), 1326-1342 (Exhibit "B", Administrative Agreement)

[18] *Ibid.*

[19] Juliano Affidavit, paras 15 and 17 and Administrative Agreement (Exhibit B), Joint Compendium of Documents, Tab 35, p.1293-1294; 1326-1342 (Administrative Agreement).

[20] Juliano Affidavit, paras. 15, 64, 84, Joint Compendium of Documents, Tab 35, p.1293, 1308, 1314.

34. The NCTR is physically and administratively integrated with the University of Manitoba and as such, is technologically, administratively and academically sophisticated and expert. Managing, storing and protecting extremely sensitive data is part of the day-to-day function and administration of the University of Manitoba. The University of Manitoba safely and securely stores hundreds of millions of records containing sensitive and confidential information, like the IAP Records. The millions of confidential and sensitive records routinely stored by the University of Manitoba include medical, psychiatric and counseling (including trauma counseling) health information of University staff, students and community members, biogenetic data, patents pending, tax, SIN, and financial information, grades, student and staff discipline proceedings and responses to sexual harassment complaints, to list only a very few examples. Highly sensitive records stored by the NCTR, such as IAP records, are stored in a state-of-the-art University of Manitoba Data Centre, in compliance with federal "Protected B" security standards.[21]

35. Access to any records archived by the NCTR will be subject to:

a. Any restrictions imposed by order of the Court;

b. Restrictions contained in an Agreement entered into with private donors, other entities, or governments, including the Government of Canada and its departments and agencies;

c. *Freedom of Information and Protection of Privacy Act* C.C.S.M. c.F175 ("FIPPA") and the *Personal Health Information Act* C.C.S.M. c.P33.5

[21] Juliano Affidavit, paras. 27-31, 49-58, Joint Compendium of Documents, Tab 35, pp.1297, 1304-1307.

("PHIA") as set out in the *National Research Centre for Truth and Reconciliation Act* ("NCTR Act")[22];

d. Restrictions imposed pursuant to University of Manitoba Access and Privacy policies and procedures[23]; and

e. NCTR specific protocols and policies, developed from an Indigenous framework and perspective and guided by best practices and policies for human rights and Indigenous archiving.[24]

36. The NCTR is survivor-centred in its governance, mission and mandate.

C. LAW AND ARGUMENT

Express Terms of the Agreement do Not Permit Destruction

37. The NCTR cross-appeals the order of Justice Perell that IAP records must be destroyed following a 15 year retention period. The Government of Canada and the Commission have also appealed Justice Perell's order in this regard. These parties argue that the terms of the Agreement, including Appendix B to the IAP Application Guide, provide for preservation by Canada of the IAP Records pursuant to the *Library and Archives Canada Act*, the *Privacy Act* and the *Access to Information Act*.[25]

38. The NCTR will not repeat the submissions made by the Commission and Canada and focuses its argument as follows:

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[22] As of the signing of this factum, the NCTR Act had passed third reading but had not yet been proclaimed into force.

[23] Juliano Affidavit, paras. 26-48, 63-71,76, 78; Administrative Agreement para. 15, Joint Compendium of Documents, Tab 35, pp. 1308-1312, 1332.

[24] Juliano Affidavit, paras. 81-87, Joint Compendium of Documents, Tab 35, pp.1313-1315.

[25] *Access to Information Act*, R.S.C., 1985, c. A-1; *Privacy Act* R.S.C., 1985 c.P-21; *Library and Archives Canada Act* S.C. 2004, c.11.

a. Destruction of records is an extreme and irreversible step. If the intention of the parties was for the records to be destroyed, the Agreement must state this intention in express terms. Destruction cannot be presumed to have been intended nor can it be implied by operation of the principle of necessity.[26] A determination by this Court that any intention to destroy records must be evidenced by explicit language in the Agreement is supported by the language and context of the Agreement as a whole. In an Agreement which is committed to reconciliation and truth, and which, at the time it was entered into, was well-understood to be a historic achievement, any intention to "destroy" records must be clear and unequivocal. The absence of any language in the Agreement that IAP records held by Canada are to be destroyed, is determinative.

b. The Agreement does not provide for destruction of records on completion of IAP Claims. The Agreement provides for confidentiality. The issue, therefore, is the mechanism, within the bounds of the Agreement, for protecting the privacy rights and interests of persons named in the preserved records.

c. The principles of self-determination and Survivor agency, ownership and control over information and records are also relevant. Survivors did not expressly consent to destruction of their records. Destruction of Survivor records by the government of Canada at the direction of individual Survivors, as permitted by the legislative regime or any order of the Court, respects

[26] *Liverpool City Council v. Irwin,* [1977] A.C. 239; *M.B.J. Entreprises (1951) Ltd. v. Defence Construction,* [1999] 1 S.C.R. 619 at para. 29, Joint Brief of Authorities, Tabs 77 & 83.

Survivors' rights to control their records of enduring historical value otherwise preserved by the Agreement.

Agreement Explicitly Preserves Survivor Rights to their Own Information and Records

39. Schedule "D" to the Agreement explicitly recognizes the right of Claimants to their own evidence and records.

40. Appendix II(i) of Schedule "D" provides that a Claimant's IAP application will only be admitted into the IAP process if the Claimant signs the Declaration set out in the application form, including the confidentiality provisions in the Declaration.

41. The confidentiality provision in the Application Form (which was attached to Schedule "D" to the Agreement approved by the Court in *Baxter v. Canada*) specifically **permits** the Claimant to disclose his or her own evidence:

> I agree to respect the private nature of any hearing I may have in this process. I will not disclose any witness statement I receive or anything said at the hearing by any participant, **except what I say myself**.[27]

42. It is noted that the confidentiality declaration contained in the Agreement does not require the Claimant to maintain confidentiality with respect to the name or identifying information of the alleged perpetrator(s) as known to the Claimant.

43. Appendix II sets out the next step in the process, after the IAP application has been filed and accepted. Specifically, Appendix II(iv) sets out the "conditions that apply to the provision of the application to the Government or a church entity." This section has been relied on by the Appellants to support a confidentiality obligation on

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[27] Affidavit of Daniel Ish, para. 34, Joint Compendium of Documents, Tab 32, p.493; Affidavit of David Russell, Exhibit "C", September 19, 2007 Application Form, Joint Compendium of Documents, Tab 47, p.1763 [June 2, 2011 version] at Tab 27, p.457.

the Survivor in respect of his or her Application. However this section applies only to responding parties and not to the Survivor. The section states that the Application will only be shared (by the these parties) with those who need to review it to assist the Government with its defence or the Church entities with their defence or insurance coverage. Copies will only be made ***by these entities*** where absolutely necessary. The section does **not** apply to the Claimant's own original or copy of his or her claim. There is nothing in the Agreement that prevents the Claimant from having, retaining or requesting from the IAP a copy of his or her Application(s) as originally filed.

44. Paragraph O of Schedule "D" sets out the private nature of the IAP hearing, once again specifically exempting the Claimant's own evidence from the confidentiality undertaking:

> Hearings are closed to the public. Parties, an alleged perpetrator and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential, **except their own evidence**, or as required within this process or otherwise by law. (emphasis added)

45. Paragraph O(i) of Schedule "D" further provides that Claimants will receive a redacted copy of the adjudicated decision and confirms that Claimants are free to discuss the outcome of their hearing, including the amount of compensation awarded.

46. Paragraph O(ii) provides that "proceedings will be recorded and will be transcribed" for various purposes related to adjudication, "**as well as if a Claimant requests a copy of their own evidence for memorialization**" (emphasis added). Since the transcript which a Claimant may obtain relates to the Claimant's "own evidence", paragraph O(ii) makes no mention, unlike paragraph O(i), of redaction of the transcript. The absence of any language with respect to redaction of the memorialized transcript is not an oversight. Paragraph O explicitly provides that adjudicated

decisions are to be redacted, but makes no similar provision for redaction of the Claimant's "own evidence." This is consistent with Survivors' fundamental rights to their own information and to tell and preserve their stories, which is unaffected by the Agreement and their participation in the IAP process.

47. Accordingly, the express terms of the Agreement establish Survivors' rights to: (i) un-redacted originals or copies of their Applications (as records which they themselves produced to the IAP); (ii) un-redacted copies of their transcript (transcribed from the audio-recording); and (iii) redacted copies of the adjudicated decision.

48. What flows from Survivors' rights to their own information, including un-redacted copies of their Applications and transcripts, however, is not wide public access to these records or to the names and personal information of perpetrators, whether government or Church representatives or other students. As will be set out below, for those Survivors who choose to archive their (un-redacted) transcripts and/or applications in the NCTR, these records will be subject to strict privacy controls governed by legislation, University of Manitoba/NCTR policies and procedures, any Agreements with Survivors as a condition of receipt of their records by the NCTR (e.g. not to disclose any personal information with respect to the Survivor as well as any other named person) and any order of this court. Survivors have a right to preserve their transcripts and applications in un-redacted form. Preservation is not publication. The NCTR will protect these records as highly restricted. The NCTR will also comply with any orders of this Court with respect to protecting identifying information.

49. Survivors rights to preserve their un-redacted transcripts in the NCTR is consistent with their rights, should they choose to do so, to tell their full story, including the names of alleged perpetrators and the details of abuse, to the Commission.[28] However, as explained by Justice Sinclair, it is neither fair, respectful of the trauma, nor consistent with the objective of the Agreement of reconciliation, to expect or require Survivors to narrate these experiences more than once. For this reason, the Agreement does not demand that Survivors re-live the abuse in multiple fora. Instead, the Agreement gives Survivors the option of preserving the un-redacted transcript of their IAP hearing in the NCTR.

Schedule "N" Paragraph 11 does not operate to negate Survivor choice

50. The Appellants argue that paragraph 11 of Schedule "N" ("Paragraph N:11") operates to prevent Survivors from sharing their own evidence, unless all "individuals affected" consent. The relevant portion of Schedule "N", under the heading "Access to Relevant Information" [by the Commission in fulfilling its mandate] reads as follows:

> Insofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP), existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes.

51. Paragraph N:11 does not give any individual or entity a right of refusal, veto or consent in respect of a Survivor's choice to archive applications, transcripts or redacted decisions with the NCTR.

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[28] Personal information contained in statements collected by the Commission and archived by the NCTR must be protected pursuant to "applicable freedom of information and privacy laws", TRC Informed Consent Form, Exhibit 1, Answers to Undertakings, Cross Examination of Thomas McMahon, June 25, 2014; this document is also attached as Exhibit "Q" to the Affidavit of John Trueman, Joint Compendium of Documents, Tab 34, pp.1110-1113.

52. Paragraph N:11 relates to the scope and content of the Commission's research, which will inform the Commission's final report. Paragraph N:11 considers the process by which records may be transferred directly from the IAP to the Commission during the course of the Commission's mandate.

53. Paragraph N:11 addresses issues, processes and concerns completely distinct and separate from the rights of Survivors to their own records and information in the IAP claims process under Schedule "D".

54. Paragraph N:11 relates to the Commission's mandate and the parties' obligations to support the Commission in fulfilling that mandate. Paragraph N:11 does not limit or otherwise affect Survivors' rights under Schedule "D". Paragraph N:11 cannot be read or understood to have any bearing on a Survivor's choice to archive his or her transcript in the NCTR, which right is explicitly, and without limitation or condition, set out in Paragraph O(ii).

55. Further, Paragraph N:11 has no application to the decision of individual Survivors to archive IAP records in the NCTR following the expiry of the Commission's mandate on December 31, 2015.

Mandatory Obligation to Inform Survivors of their Rights to Preserve their Transcript

56. Pursuant to Schedule D, III (O)(ii) to the Agreement, the parties were and are legally obligated to inform Survivors of their option to archive their records:

> Proceedings will be recorded and will be transcribed for these purposes, as well as if a Claimant requests a copy of their own evidence for memorialization. **Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose.** (emphasis added).

57. The language of the Agreement in this regard is mandatory.

58. Of the approximately 38,000 IAP applications received by the IAP as of August 2013, approximately 20,000 had been heard/resolved by that date.[29] The number of completed hearings to the date of this Appeal is much higher.

59. The IAP process and the Commission's work are winding down and both entities are nearing the end of their mandates. Most IAP hearings have now been completed. Survivors, as a result of the sequelae of trauma as well as other factors (including age), are a group in fragile health and are passing every day.

60. The question before the lower Court and now on appeal to this court is how, at this late stage, to give effect to the mandatory obligation in the Agreement to give Survivors the option of archiving their IAP transcript.

61. Justice Perell's solution was to order a robust enhanced Notice Plan, the details of which would be determined at a hearing commenced by way of a Request for Directions brought by the NCTR or the Commission. Both the NCTR and the Commission filed Requests for Directions in December 2014, which have not proceeded pending the determination of this Appeal.

The Court has Jurisdiction to Order an Enhanced Notice Plan

62. It is well accepted that the court has ongoing supervisory jurisdiction to interpret, enforce, administer and oversee the implementation of the Agreement. The Court's jurisdiction arises "from at least three sources": "the court's jurisdiction over the administration of a class action settlement", "the court's plenary jurisdiction from

[29] Affidavit of Daniel Shapiro, sworn September 26, 2013 ("Shapiro Affidavit"), para. 4, Joint Compendium of Documents, Tab 31, p.470.

s.12 of the *Class Proceedings Act, 1992* S.O. 1992, c.6"; and "the court's jurisdiction derived from the IRSSA, which includes its jurisdiction to interpret and enforce contracts and its own orders, including its approval and implementation orders of the IRSSA."[30]

63. As summarized by Justice Perell in *Fontaine v. Canada* 2014 ONSC 283 at paras. 155 - 166:

- The Court has broad powers under s.12 of the *Class Proceedings Act* to ensure that a class action proceeds in both an efficient and fair manner and to impose such terms on the parties as it considers appropriate;
- The court is authorized to issue such orders as are necessary to implement and enforce the provisions of the Agreement, short of varying the settlement reached by the parties or imposing burdens on the defendants they did not agree to assume;
- The Court has an ongoing obligation to oversee the implementation of the settlement and to ensure that the interests of the class members are protected. Where there are vulnerable claimants, the court's supervisory jurisdiction will permit the court to fashion such terms as are necessary to protect the interests of that group.

64. The parties to the Agreement expressly undertook to advise Survivors of their rights to archive their IAP transcript. To date that obligation is unfulfilled. The Court's decision to order an enhanced Notice Plan, as a "fair and efficient" method for protecting the rights of the vulnerable claimant group, is appropriate and within the jurisdiction of the Court to implement and administer the Agreement.

The Court Below Erred in Pre-Determining Aspects of the Enhanced Notice Plan

65. If this Court upholds Justice Perell's order with respect to an enhanced Notice Plan, the NCTR submits that paragraph 4 of the August 6, 2014, Order be set aside and that

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[30] *Fontaine v. Canada* 2014 ONSC 283 (CanLii) at para. 154 Joint Brief of Authorities, Tab 45.

the process for obtaining Survivor consent and transfer of IAP records to the NCTR be determined in the enhanced Notice Plan Hearing.

66. As recognized by Justice Perell in his reasons for decision, "the precise terms of the notice program should be an evidence-based decision", which evidence was not before the Court in hearing in the Court below.

67. Of critical concern to the NCTR is that the "precise details" of the Notice Plan hearing must include evidence and legal submission with respect to:

a. The mechanism for obtaining consent from Survivors, including whether "written consent" is appropriate or necessary in all circumstances;

b. The possible mechanisms for obtaining consent from, or reliably identifying the consent of, Survivors who are deceased or incapable. This issue is of particular concern given the number of years over which Schedule "D", paragraph O(ii) was not implemented, the age and health of IAP Claimants, and the numbers of Survivors who have already passed; and

c. The methods and mechanism for redaction of documents and the NCTR's (and not the IAP's) responsibility for such redaction.

68. It is submitted that Justice Perell erroneously made determinations on the above issues in the absence of the necessary evidentiary record and legal submissions.

Alternative Method to Implement Paragraph O(ii)

69. The NCTR submits that should this Court uphold Justice Perell's ruling that implementation of Paragraph O(ii) is outstanding, but this Court is inclined to order a more fulsome hearing (by way of Request for Directions) to determine ***how*** that outstanding obligation should now be fulfilled, other possible options are available to implement this term of the Agreement.

70. It is unknown how many Survivors would have chosen to archive their records, had they had the benefit of full information on the purposes of archiving their transcripts and the significant privacy and other protections available in the Indigenous Archive, the NCTR. Based on the few responses from Survivors to the Merchant Law Group form letter (which asked for consent to public release of the transcripts with the personal information of Survivors identified), we know that a not insignificant percentage of Survivors would have made this choice.[31]

71. In the Court below, the IAP Chief Adjudicator adduced an expert opinion from David Flaherty with respect to, among other things, possibilities for "Disposition of the Records."[32] Dr. Flaherty identified a range of options for disposition based on his view of the privacy rights and interests engaged and his interpretation of the Agreement and applicable privacy laws and principles. The NCTR does not endorse the assertions or opinions stated in Dr. Flaherty's Affidavit, but refers to Dr. Flaherty's evidence insofar as it lists alternative approaches.

72. In his discussion of the options, Dr. Flaherty canvassed anonymization and reversible anonymization of records as possible solutions to the Request for Directions as framed before Justice Perell. Dr. Flaherty referred, for example, to extensive personal record sets in Sweden which were anonymized to protect personal privacy while preserving the valuable aggregate information contained in the records. It is

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[31] Of the 66 responses received by Mr. Merchant's firm to the 200 IAP clients to whom the form letter was sent, 9 persons (13.6%) said that they did "not object" to their "personal information being disclosed to the Truth and Reconciliation Commission." For some, the reasons why they ticked off the box "I object" included a need for more information, for example: "Not sure what info will be disclosed" (p.2130) or other reasons such as "I may write my own book" (p.2181); Affidavit of Percy Gordon, sworn May 12, 2014, Exhibit A, Joint Compendium of Documents, Tab 50, pp.2124-2191.

[32] Affidavit of David Flaherty, sworn May 2, 2014 ("Flaherty Affidavit"), Joint Compendium of Documents, Tab 45, para. 8(5) p.1610-1611.

noted that there was no discussion by Dr. Flaherty, in relation to the example of the anonymized Swedish records, of any privacy breaches or risks of re-identification.[33]

73. One reason why Dr. Flaherty did not recommend reversible anonymization (de-identification) as his preferred recommendation for the IAP records at issue was because, according to his evidence at paragraph 74 of his Affidavit, the "risks of re-identification are very high." In making this assertion, Dr. Flaherty references Dr. Khaled El Emam of the University of Ottawa, the leading expert on de-identification in Canada.[34] Dr. El Emam's recent publications list a "rich literature" with respect to the extensive use of de-identified health data in Canada and the methods to ensure very minimal risks of re-identification. Dr. El Emam's publications include a co-authored publication with (then) Information and Privacy Commissioner for Ontario, Dr. Anne Cavoukian: *Dispelling the Myths Surrounding De-Identification: Anonymization Remains a Strong Tool for Protecting Privacy* (Information and Privacy Commission, 2011). In this IPC publication, the IPC states:

> As long as proper de-identification and re-identification risk measurement techniques are employed, the re-identification of individuals is relatively difficult in actual practice. In fact, a recent review of the evidence indicates that there are few cases in which properly de-identified data have been successfully re-identified.[35]

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[33] Flaherty Affidavit, para. 50, Joint Compendium of Documents, Tab 45, pp.1633-1634.

[34] Flaherty Affidavit, para.74, footnote 52, Joint Compendium of Documents, Tab 45, p.1643.

[35] A. Cavoukian and K. El Emam, *Dispelling the Myths Surrounding De-Identification: Anonymization Remains a Strong Tool for Protecting Privacy* (Toronto: Information and Privacy Commission, 2011) at p. 6 (see also pp.1 and 15). Council of Canadian Academies, 2015. Accessing Health and Health-Related Data in Canada. Ottawa (ON): The Expert Panel on Timely Access to Health and Social Data for Health Research and Health System Innovation, Council of Canadian Academies (see Executive Summary at p.xix which identifies a de-identification process reflecting best practices), downloaded at: http://www.scienceadvice.ca/uploads/eng/assessments%20and%20publications%20and%20news%20releases/Health-data/HealthDataExecSumEn.pdf.

74. The University of Manitoba has had decades of experience with securely managing de-identified data for both administrative and research purposes, including highly sensitive personal health data.

75. The NCTR submits that, in the circumstances of the passage of time and the failure to implement Paragraph O(ii) over the seven to eight years of the life of the Agreement to date, the Court has jurisdiction to give effect to Paragraph O(ii) by ordering the transfer of the entire set of un-redacted transcripts to the NCTR, subject to an order that the records be fully de-identified by the NCTR to remove the personal information of Survivors, alleged perpetrators and others named in them.

76. This possible alternative "fair and efficient" solution would balance the rights of Survivors who would choose to archive their records with those who might refuse this option, as well as respecting the privacy rights and interests of survivors, alleged perpetrators and others, by removing all identifying information. Personal information of those named in the records, including survivors, would never be made public. Subject to court order, the NCTR would identify Survivors only with their consent. Further, at the request of Survivors, the NCTR would remove their anonymized/de-identified records from the NCTR.

77. While not a factor which the Court can consider, the NCTR notes that the above alternative method to implement Paragraph O(ii) of the Agreement would balance the rights of Survivors and perpetrators to privacy and confidentiality with the rights of intergenerational survivors and their communities to a permanent (and undeniable) record of the atrocities committed at Indian Residential Schools.

Privacy Protections for Survivors, Perpetrators and Others at the NCTR

78. IAP Records archived by the NCTR are subject to the Manitoba FIPPA, PHIA and the NCTR Act. They will also be subject to strict procedures and protocols by the University of Manitoba and the NCTR. The NCTR, unlike any other archive, will manage these records with a view to reconciliation, to benefiting Indigenous peoples in Canada, and with a commitment to "do no harm."

79. As recognized by the NCTR Act, IAP records archived by the NCTR at the request of Survivors are private donations and may, as a condition of that donation, be subject to protections over and above those provided in provincial and federal privacy legislation or those set out in the NCTR Act. For example, a Survivor may require, as a condition or archiving, that the record be preserved but that no names or identifying information ever be publicly released.

80. Further, the Administrative Agreement and the NCTR Act contemplate that this Court may make orders with respect to protection of privacy in the IAP records. Paragraph 36 of the Administrative Agreement acknowledges that IAP records archived by the NCTR may be subject to "particular confidentiality provisions, imposed by a court of competent jurisdiction, or otherwise." Similarly s.8(1)(b) of the NCTR Act confirms that the NCTR must restrict disclosure of records and information if "a court order prohibits disclosure."

81. The NCTR has always acknowledged the IAP records as a highly sensitive and private set of records, which will not be subject to the NCTR's commitment, in respect of other records, to wide public accessibility. The mandate to preserve history and to give voice to Survivors as an essential component of reconciliation, does not

give rise to the wide naming of names, even with the consent of the Survivor. The privacy of all persons (Survivors, alleged perpetrators and others) will be protected, as required by the NCTR's governing legislation, instruments, policies and procedures, and, if this Court deems necessary, by any further order.

Standard of Review and Jurisdiction of the Court to Hear this Appeal

82. The NCTR submits that the standard of review of the Court's decision is correctness.[36]

83. The NCTR submits that the lower Court's decision finally determined the rights of various parties to the Agreement in respect of the IAP records, by interpretation of the Agreement and applicable federal statutes. Accordingly, the appeal of Justice Perell's order properly lies with the Ontario Court of Appeal pursuant to s.6(1)(b) of the *Courts of Justice Act*.[37]

Conclusion

84. Survivors did not take a vow of silence in exchange for their claim for compensation. In fact, the Agreement specifically anticipated that certain IAP records (the transcripts) were of sufficient importance to Survivors and to history, that these records – without redaction or limitation – would be archived at the direction of the Survivor.

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[36] *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, Joint Brief of Authorities, Tab 98.

[37] *Parsons v. Ontario* 2015 ONCA 158, at paras. 49-53 Joint Brief of Authorities, Tab 90; see also *Fontaine v. Duboff Edwards Haight and Schacter*, 2012 ONCA 471 at para.41 Joint Brief of Authorities, Tab 54; *Fontaine v. Canada* 2008 BCCA 60 at paras. 11 and 12 Joint Brief of Authorities, Tab 36; and *Fontaine v. Canada* 2008 BCCA 329 at para. 29, Joint Brief of Authorities, Tab 37.

85. If the underpinning of the Agreement is respect for the dignity and experiences of trauma of Survivors and their right – finally – to tell their full stories, there is no basis in the Agreement for limiting Survivors rights to preserve their own evidence and records in the NCTR. To the extent that there may be privacy interests by others in Survivors' narratives in the Applications, transcripts/audio recordings or redacted decisions, these rights or interests are a consideration for the NCTR's management and protection of the record set. They do not operate to silence Survivors who choose to preserve the details of the individual, and collective, history of abuse perpetrated in and by Indian Residential Schools.

ORDER REQUESTED

86. The NCTR seeks an Order setting aside in part and varying in part the Court's Order of August 6, 2014, as follows:

a. Setting aside paragraphs 1, 4, 5, 6, 7, 10, 11 and 12 and Schedule "A" insofar as they order, or are related to the order, that IAP Applications, hearing transcripts/audio recordings and adjudicated decisions be destroyed rather than preserved by Canada;

b. For greater certainty and to protect Survivors' rights, varying paragraphs 4 and 6 to require Canada to preserve IAP Applications, hearing transcripts/audio recordings and adjudicated decisions for a period of 15 years;

c. Varying paragraphs 1, 2, 3, 4, 5 and Schedule "A" to the extent that these paragraphs prevent Survivors from obtaining and preserving un-redacted copies of their Applications and transcripts/audio-recordings in the NCTR;

d. Confirming Justice Perell's order of an enhanced Notice Plan to inform Survivors of their rights to archive their IAP records, but setting aside paragraphs 4(a)-(f) which prematurely order various terms for the consent program; and

e. In the alternative to (d) above, setting aside the order with respect to the Notice Plan hearing and directing the Commission or the NCTR to bring a Request for Directions to determine how the obligation to inform Survivors of

their right to archive their IAP transcript pursuant to Schedule "D", paragraph O(ii) should now be fulfilled.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ~~this 16th day of July, 2015~~.this 15th day of October, 2015

Joanna Birenbaum
Barrister and Solicitor
555 Richmond Street West
Suite 1200
Toronto, Ontario
M5V 3B1

Phone: (647) 500-3005
Fax: (416) 968-0325

Counsel for the National Centre
for Truth and Reconciliation

SCHEDULE "A"

Case Law

1. *Fontaine v. Canada* (Attorney General), 2006 YKSC 63
2. *Liverpool City Council v. Irwin,* [1977] A.C. 239
3. *M.B.J. Enterprises (1951) Ltd. v. Defence Construction,* [1999] 1 S.C.R. 619
4. *Fontaine v. Canada* 2014 ONSC 283 (CanLii)
5. *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53
6. *Parsons v. Ontario,* 2015 ONCA 158
7. *Fontaine v. Duboff Edwards Haight and Schacter*, 2012 ONCA 471
8. *Fontaine v. Canada,* 2008 BCCA 60
9. *Fontaine v. Canada,* 2008 BCCA 329

Secondary Sources

1. A. Cavoukian and K. El Emam, Dispelling the Myths Surrounding De-Identification: Anonymization Remains a Strong Tool for Protecting Privacy (Toronto: Information and Privacy Commission, 2011)
2. Council of Canadian Academies, 2015. Accessing Health and Health-Related Data in Canada. Ottawa (ON): The Expert Panel on Timely Access to Health and Social Data for Health Research and Health System Innovation, Council of Canadian Academies.

SCHEDULE "B"

1. *Access to Information Act*, R.S.C., 1985, c. A-1

2. *Privacy Act* R.S.C., 1985 c.P-21

3. *Library and Archives Canada Act* S.C. 2004, c.11.

4. *The Freedom of Information and Protection of Privacy Act*, C.C.S.M., c. F175 Manitoba

5. *The Personal Health Information Act* (PHIA), C.C.S.M., c.P33.5 Manitoba

6. *The National Research Centre for Truth and Reconciliation Act*, Bill 6, 4th Session, 40th Legislature, Manitoba (2014)

LARRY PHILIP FONTAINE et al.
Plaintiffs

- and

THE ATTORNEY GENERAL OF CANADA et al.
Defendants

Court of Appeal File No.: C59310
Court of Appeal File No.: C59311
Court of Appeal File No.: C59320

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

UPDATED REPLY FACTUM OF THE RESPONDENT, NATIONAL CENTRE FOR TRUTH AND RECONCILIATION WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES

JOANNA BIRENBAUM
555 Richmond Street West
Suite #1200
Toronto, Ontario M5V 3B1

Joanna Birenbaum (LSUC #40352G)

(B) (647) 500-3005
(f) (416) 968-0325

Solicitors for the National Centre for Truth and Reconciliation